

LESSON PLAN

for

Department of Defense Policy on Homosexual Conduct:

Officer Accession Programs/General Military Training/Command Indoctrination/
Navy Rights and Responsibilities/Policy Administrators/Commanders

Prepared for:

CHIEF OF NAVAL EDUCATION AND TRAINING

and

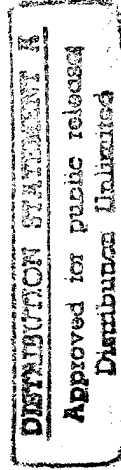
Naval Education and Training Program Management Support Facility

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DEPARTMENT OF THE NAVY
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From: Chief of Naval Education and Training
To: All Ships and Stations

Subj: HOMOSEXUAL POLICY TRAINING

Ref: (a) NAVADMIN 033/94

Encl: (1) Lesson Plan for Department of Defense Policy
on Homosexual Conduct

1. In accordance with reference (a), enclosure (1) is forwarded for command training. This Lesson Plan was developed primarily for accession sources and policy implementors (i.e. chain of command). All officer accessions and policy implementors are required to meet all objectives of enclosure (1). The Lesson Plan may be tailored as required for specific audiences during all hands (GMT) training in accordance with reference (a); however, the content of the Lesson Plan shall not be modified.

2. The CNET point of contact is Mr. Bill Andrew (T2414), DSN 922-4027, commercial (904) 452-4027, fax 922-8084.

[Signature]
J. S. COLEMAN
Director of Shore/Technical Training

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LESSON PLAN

CHANGE RECORD

Number and Description of Change	Entered by	Date

LESSON PLAN

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LESSON PLAN

PREFACE

Memorandum from Mr. Edward Dorn, Assistant Secretary of Defense, (Personnel and Readiness,) of 21 December 1993.

On 29 January 1993, the President directed the Secretary of Defense to develop a policy "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States." The President further directed that the policy be implemented in a manner that is "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain."

On 5 April 1993, the Secretary of Defense directed that a Military Working Group (MWG) be formed to develop and assess alternative policy options to meet the President's requirements. Fairness and objectivity were major aims of the MWG's process. In pursuit of those aims, the MWG met with individuals and groups holding a broad spectrum of views on the subject. This included meetings with uniformed and civilian experts from inside and outside the Department of Defense (DOD), including the Service members who would be most affected by the policy. To broaden understanding of the issue, the MWG also compared experiences of the militaries of other countries, researched available literature, and performed statistical analyses of military separation data obtained from the Services.

Also in April 1993, the Secretary of Defense commissioned RAND's National Defense Research Institute to provide information and analysis that would be useful in helping formulate the draft policy. A multidisciplinary team of researchers was drawn from a number of departments at RAND. Their research and analysis was provided to the Secretary of Defense prior to the decision announced by the Secretary and the President on July 19, 1993.

After comprehensive study and with the concurrence of the Joint Chiefs of Staff, the Secretary of Defense has established a policy determined to be in the best interest of the United States Armed Forces. The provisions of the National Defense Authorization Act for Fiscal Year 1994 related to this issue are fully consistent with this new policy.

Although this briefing is designed for personnel involved in policy implementation and personnel administration, it is evident that information regarding this policy will continue to be of interest to all members of the Armed Forces. The policy must be explained clearly and precisely to ensure that the policy is fully and consistently effectuated.

This training plan is offered to assist all Services in accomplishing that goal.

LESSON PLAN

SAFETY/HAZARD AWARENESS NOTICE

There are no safety hazards associated with this training.

LESSON PLAN

HOW TO USE THE LESSON PLAN

COMPOSITION OF THE LESSON PLAN

This Lesson Plan (LP) is designed for Officer Accession Programs, Command Indoctrination, Navy Rights and Responsibilities (NRR), General Military Training (GMT), training programs for those personnel involved in administrative separations or investigations, and Commanders.

This Lesson Plan (LP) provides the instructor with the information required to prepare for and instruct the topics assigned. As an introduction to each topic the instructor shall display his/her name and the topic title on the chalkboard. The instructor will also inform the students of the topic learning objective(s), establish classroom procedures (questioning, note taking, breaks, etc.), and motivate the students by emphasizing the importance of the topic. Each topic within this LP contains the following sections:

Enabling Objectives: This section lists the objectives of the lesson in the order in which they are to be accomplished.

Student Preparation: This portion lists the study and review material that the student must complete to prepare for the topic.

Instructor Preparation: This part of the topic page contains:

A reminder to review student material.

A list of all reference materials required by the instructor to prepare for instructing a topic.

A list of student materials required for the topic.

Discussion - Demonstration - Activity Pages: These pages are divided into two columns as shown below:

Discussion Point. This column outlines the subject matter to the depth necessary to support the corresponding enabling objective. Sufficient space is provided for instructor personalization.

HOW TO USE THE LESSON PLAN (Continued)

Related Instructor Activity. This column lists specific instructor activities, excluding oral discussion, which will aid in student learning. The column provides the instructor specific instructions relative to reference documents, instructional media material, and guidance concerning student behavior during presentation of instruction. The term "Refer to ..." provides direction for the instructor when the reference material is actually intended for use in the classroom. As with the "Discussion Point" column, space is left for the instructor to add personalizing notes.

FUNCTION OF THE LESSON PLAN

The LP presents information developed from the approved objectives in a format that will serve as an effective plan for instruction. It provides room for instructors to add individual notes. The form of the LP facilitates preparation, minimizes deviation from the approved plan for the topic, and lessens the need for rewriting material already contained in the outline. As an instructor prepares to teach a topic for the first time, the instructor may write in data, information, or notes to be used to do a professional job of instruction. As instructors gain experience teaching a topic, they may modify and improve their notes.

LESSON PLAN

COURSE OBJECTIVE

1.0 DESCRIBE the Department of Defense Policy on Homosexual Conduct:

To inform, clarify, and answer questions pertaining to the Department of Defense Policy on Homosexual Conduct.

ENABLING OBJECTIVES

1.1 DESCRIBE the overall policy toward homosexual conduct for the Department of Defense.

1.2 DESCRIBE the meaning of key definitions related to the Department of Defense Policy on Homosexual Conduct.

1.3 DESCRIBE the key features of the Department of Defense Policy toward Homosexual Conduct.

2.1 DESCRIBE the procedures related to accessions to military service and homosexual conduct.

2.2 DESCRIBE the Department of Defense policy regarding separation from military service for reasons of homosexual conduct.

3.1 DESCRIBE the procedures for investigation of misconduct by Defense Criminal Investigative Organization and other Department of Defense Law Enforcement Organizations.

3.2 DESCRIBE the procedures used for matters of personnel security.

4.1 DESCRIBE the requirements for conducting training on Department of Defense Policy toward Homosexual Conduct.

LESSON PLAN

1. POLICY OVERVIEW

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 1.1 Introduction

Enabling Objective:

C. Training Materials Required:

1.1 DESCRIBE the overall policy toward homosexual conduct for the Department of Defense.

1. Overhead Projector

2. Transparencies:

Trainee Preparation Material:

a. 1-1-1

A. Trainee Support Materials:

b. 1-1-2

1. None

c. 1-1-3

B. Reference Publications: None

d. 1-1-4

Instructor Preparation:

e. 1-1-5

A. Review Assigned Training Material

B. Reference Publications:

1. SECDEF Memo of 21 DEC 93
2. NAVADMIN 033/94 (CNO Washington DC)
010300Z MAR 94
3. UCMJ Articles 117, 125, 128, and 134
4. MILPERSMAN Article 3630400

1. POLICY OVERVIEW

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 1.1 Introduction

DISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

1. Introduction

- a. The purpose of this course is to inform, clarify, and answer questions pertaining to the Department of Defense (DOD) policy on Homosexual Conduct.
- b. Course material is based on DOD policy toward Homosexual Conduct as implemented in the Secretary of Defense (SECDEF) memo of 21 DEC 93 and NAVADMIN 033/94.
- c. This course is not:
 - (1) Sensitivity training
 - (2) A forum to debate policy
 - (3) A complaint session
 - (4) Intended as an opportunity to discuss personal values or beliefs

d. Policy

- (1) It is the DOD policy to judge the suitability of persons to serve in the Armed Services on the basis of their conduct and their ability to meet required standards of duty performance and discipline. A person's sexual orientation is considered a personal and private matter, and is not a bar to military service unless manifested by

SHOW Transparency 1-1-1.

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

1. POLICY OVERVIEW

Topic 1.1 Introduction

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

homosexual conduct. Homosexual conduct is grounds for separation from the Military Services.

e. The new directives implement DOD policy in five areas:

- (1) Accessions
- (2) Separations
- (3) Criminal investigations
- (4) Personnel security
- (5) Military training

f. Governing Directives

- (1) DOD Directives as addressed in SECDEF memo of 21 DEC 93

(2) UCMJ Articles

- (a) 117
- (b) 125
- (c) 128
- (c) 134

SHOW Transparency 1-1-2.
SHOW Transparency 1-1-3.
SHOW Transparency 1-1-4.
SHOW Transparency 1-1-5.

- (3) Navy Military Personnel Manual (MILPERSMAN)
Article 3630400

1. POLICY OVERVIEW

Topic 1.2 Key DefinitionsEnabling Objective:

- 1.2 DESCRIBE the meaning of key definitions related to the Department of Defense Policy on Homosexual Conduct.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. MILPERSMAN Article 3630400

C. Training Materials Required:

1. None

1. POLICY OVERVIEWTopic 1.2 Key DefinitionsDISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

1. Key Definitions

- a. Propensity to engage in homosexual acts
 - (1) More than an abstract preference or desire to engage in homosexual acts. It indicates a likelihood that a person engages in or will engage in homosexual acts.
- b. Homosexual
 - (1) A person, regardless of gender, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- c. Bisexual
 - (1) A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in both homosexual and heterosexual acts.
- d. Sexual Orientation
 - (1) An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

1. POLICY OVERVIEW

Topic 1.2 Key Definitions

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

- e. The following actions constitute a homosexual act:
 - (1) Any bodily contact, actively undertaken or passively permitted, between individuals of the same sex for the purpose of satisfying sexual desires, and/or,
 - (2) Any bodily contact a reasonable person would understand to demonstrate a propensity or intent to engage in a homosexual act described in e (1) above.
- f. Statement that a member is a homosexual or a bisexual (or words to that effect)
 - (1) Language or behavior that a reasonable person would believe was intended to convey the information that the person engages in, attempts to engage in or has a propensity or intent to engage in homosexual acts.
- g. Homosexual marriage or attempted homosexual marriage
 - (1) When a Service member has married or attempted to marry a person known to be of the same biological sex.
- h. Homosexual Conduct
 - (1) A homosexual act,

LESSON PLAN

1. POLICY OVERVIEW

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 1.2 Key Definitions

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

(2) A statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or

For example/discussion: Refer to Scenario 1.

(3) Homosexual marriage or attempted homosexual marriage.

i. Credible information

For example/discussion: Refer to Scenario 2.

(1) Information, considering its source and the surrounding circumstances, that supports a reasonable conclusion that there is a basis for discharge. It requires a determination based on articulated facts, not just a belief or suspicion.

j. Military Personnel

(1) Any person serving in the Military Service (active or reserve components) as an enlisted member, or as a commissioned or warrant officer, any person enrolled in scholarship or advanced course Reserve Officers Training Corps programs, and any person in other Armed Forces special officer personnel procurement programs, including the Military Academies.

1. POLICY OVERVIEW

Topic 1.2 Key Definitions

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

k. Commander

- (1) A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

1. POLICY OVERVIEW

Topic 1.3 Key Policy FeaturesEnabling Objective:

- 1.3 DESCRIBE the key features of the Department of Defense Policy toward Homosexual Conduct.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. MILPERSMAN 3630400

C. Training Materials Required:

1. Overhead Projector

2. Transparency

- a. 1-3-1

LESSON PLAN

1. POLICY OVERVIEW

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 1.3 Key Policy Features

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

1. Key Policy Features

SHOW Transparency 1-3-1.

a. Sexual Orientation versus Sexual Conduct

- (1) Sexual orientation is considered a personal and private matter, and is not a bar for military service entry or continued military service unless manifested by homosexual conduct.

For example/discussion: Refer to Scenario 3.

- (2) An applicant, or military member will not be asked, nor required to reveal, their sexual orientation.

For example/discussion: Refer to Scenario 4.

- b. If a military person engages in homosexual conduct at any time while in the military, he or she is subject to administrative separation. Homosexual conduct includes a homosexual act, a statement by language or behavior, that the military person engages in or demonstrates a propensity or intent to engage in, homosexual acts, or a homosexual marriage or attempted homosexual marriage.

LESSON PLAN

1. POLICY OVERVIEW

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 1.3 Key Policy Features

DISCUSSION POINT

- c. A statement (language or behavior) by a military person that he or she engages in homosexual acts or that demonstrates a propensity or intent to engage in homosexual acts -- such as statements by the member that he or she is a homosexual -- is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood the member engages in or will engage in homosexual acts.
- d. The Commander must determine credible information exists that indicates there is a basis for discharge before initiating Commander's fact-finding inquiries or military criminal investigations.

RELATED INSTRUCTOR ACTIVITY

For example/discussion: Refer to Scenario 2.

For example/discussion: Refer to Scenario 3 and 5.

LESSON PLAN

2. ACCESSIONS AND SEPARATIONS

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 2.1 Accessions

Enabling Objective:

2.1 DESCRIBE the procedures related to accessions to military service and homosexual conduct.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. NAVADMIN 033/94 (CNO Washington DC)
010300Z MAR 94

C. Training Materials Required:

1. None

LESSON PLAN

2. ACCESSIONS AND SEPARATIONS

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 2.1 Accessions

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

1. Accessions

a. Applicant for Military Service

- (1) No applicant will be asked or required to reveal his or her sexual orientation as part of the accession process.

For example/discussion: Refer to Scenario 6.

b. Warning

- (1) All applicants and inductees will be advised before enlistment that homosexual conduct is grounds for separation from the Armed Forces.

c. Homosexual Conduct

- (1) No applicant will be asked or required to reveal whether they have engaged in homosexual conduct unless:

- (a) Independent evidence is received indicating an applicant engaged in such conduct; or

- (b) The applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

2. ACCESSIONS AND SEPARATIONS

Topic 2.1 Accessions

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

- [1] An applicant's statement of homosexual conduct creates a presumption that the person engages in homosexual acts or has a propensity or intent to engage in homosexual acts.
- [2] An applicant will be rejected for entry if he or she makes a statement that he or she is a homosexual, or words to that effect, unless there is a further determination the applicant has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Such a determination will be made in the course of the normal accession process.

LESSON PLAN

2. ACCESSIONS AND SEPARATIONS

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 2.2 Separations

Enabling Objective:

2. Transparency:

2.2 DESCRIBE the Department of Defense policy regarding separation from military service for reasons of homosexual conduct.

a. 2-2-1

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publications:

1. MILPERSMAN 3630400

2. NAVADMIN 033/94 (CNO Washington DC)
010300 MAR 94

C. Training Materials Required:

1. Overhead Projector

2. ACCESSIONS AND SEPARATIONS

Topic 2.2 Separations

DISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

1. Separation Policy

- a. Separation policy has been revised to emphasize that persons are judged on their suitability to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline.

- b. The policy sets forth three bases for separation

(1) Homosexual Acts

- (a) Individuals will be separated if they have engaged in, attempted to engage in, or solicited another to engage in homosexual act or acts.

- (b) An individual may be retained if approved findings determine:

[1] Such acts are a departure from the individual's usual and customary behavior under all circumstances, are unlikely to recur, and were not accomplished by use of force, coercion, or intimidation; and

For example/discussion: Refer to Scenario 7.

2. ACCESSIONS AND SEPARATIONS

Topic 2.2 Separations

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

[2] Under the particular circumstances of the case, the individual's continued presence in the naval service is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and

[3] The individual does not have a propensity or intent to engage in homosexual acts.

(c) The individual will bear the burden of proving, by preponderance of evidence, retention is warranted under the limited circumstances described in paragraphs (b) [1], [2], and [3] above.

(2) Statements

(a) An individual may be separated if he or she states (by language or behavior) he or she is a homosexual or bisexual or words to that effect. This statement creates a presumption that the person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

For example/discussion: Refer to Scenario 8.

2. ACCESSIONS AND SEPARATIONS

Topic 2.2 Separations

DISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

- (b) The individual will be advised of this presumption and given the opportunity to rebut the presumption by demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in, homosexual acts. The member will bear the burden of proving, by a preponderance of the evidence, retention on this basis is warranted. In determining whether the individual has rebutted the presumption, some or all of the following may be considered:

- [1] Whether the individual has engaged in homosexual acts;
- [2] The individual's credibility;
- [3] Testimony from others about the individual's past conduct, character, and credibility;
- [4] The nature and circumstances of the individual's statement; and,
- [5] Any other evidence relevant to whether the individual is likely to engage in homosexual acts.

For example/discussion: Refer to Scenario 9.

NOTE: This list is not exhaustive; any other relevant evidence may be considered.

2. ACCESSIONS AND SEPARATIONS

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

Topic 2.2 Separations

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

(3) Homosexual Marriages

- (a) An individual who has married or attempted to marry a person of the same biological sex shall be separated.

2. Separation Procedures

- a. A commander will initiate a fact-finding inquiry if he or she has credible information that a basis for discharge exists.

- (1) Only an individual's commander is authorized to initiate a fact-finding inquiry involving alleged homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information there is basis for discharge. Commanders are responsible for ensuring inquiries are conducted properly and no abuse of authority occurs.

For example/discussion: Refer to Scenario 10.

- (2) A fact-finding inquiry may be conducted by the commander personally or by a person or persons appointed by the commander. It may consist of an examination of the information reported or a more extensive investigation as necessary.

For example/discussion: Refer to Scenario 11.

Topic 2.2 SeparationsDISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

- (3) The inquiry should gather all credible information that directly relates to the grounds for separation. Inquiries will be limited to the factual circumstances directly relevant to the specific allegations. At no time during the inquiry will the commander or appointed inquiry official ask, nor will an individual be required to reveal, their sexual orientation; however, upon receipt of credible information of homosexual conduct (as defined previously) commanders or appointed inquiry officials may ask members if they engaged in such conduct.
- (4) At any given point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically articulate which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.
- (5) Commanders or appointed inquiry officials will not ask, and members will not be required to reveal their sexual orientation; however, upon receipt of credible information of homosexual conduct, commanders or appointed inquiry officials may ask members if they engaged in such conduct. The member should first be advised of the DOD policy on homosexual conduct (and rights under Article 31, UCMJ, if appropriate).

SHOW Transparency 2-2-1.

2. ACCESSIONS AND SEPARATIONS

Topic 2.2 Separations

DISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

Should the member choose not to discuss the matter further, the commander should consider other available information.

- (6) A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in, homosexual acts. The Service member will be given the opportunity to present evidence demonstrating he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in, homosexual acts.
- (7) If the fact finding inquiry determines that credible evidence of non-criminal homosexual conduct exists, administrative separation of the Service member is the norm. (This does not prevent disciplinary action or trial by courts-martial when the commander deems appropriate.) The commander will initiate the following separation procedures.
 - (a) Enlisted Members. Separation procedures will be in accordance with administrative board procedures.

Topic 2.2 SeparationsDISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

- (b) Officers. Referred to a Board of Inquiry if the show-cause authority supports a finding of homosexual conduct. Show-cause authority is a commander exercising general court martial authority, any general or Flag rank officer in command who have a Judge Advocate or legal advisor available or the Secretary of the Navy or officers designated by the Secretary of the Navy.

- (8) If the fact-finding inquiry reveals credible evidence of criminal homosexual conduct (i.e., involving aggravating circumstances) the commander may initiate disciplinary action or courts martial proceedings.

- b. Separation of military personnel is not required if it is found homosexual conduct or attempted homosexual conduct was engaged in for the purpose of avoiding military service, and separation of the individual would not be in the best interest of the Armed Forces.
- 3. Characterizations of Discharges
 - a. A discharge characterized as "Honorable" or "General (Under Honorable Conditions)" will be made unless aggravated acts are included in the findings.

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

2. ACCESSIONS AND SEPARATIONS

Topic 2.2 Separations

DISCUSSION POINT

- b. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding the individual attempted, solicited, or committed a homosexual act under any of the following conditions:

- (1) By using force, coercion, or intimidation
- (2) With a person under 16 years of age
- (3) With a subordinate in circumstances violating the customary military superior-subordinate relationship
- (4) Openly in public view
- (5) For compensation
- (6) Aboard a military vessel or aircraft
- (7) In another location subject to military control (e.g., BEQ, BOQ, Navy Housing) under aggravating circumstances having an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

RELATED INSTRUCTOR ACTIVITY

NOTE: This list is not exhaustive; any other relevant evidence may be considered.

3. INVESTIGATIONS AND SECURITY

Topic 3.1 Investigations

Enabling Objective:

3.1 DESCRIBE the procedures for investigation of misconduct by Defense Criminal Investigative Organization and other Department of Defense Law Enforcement Organizations.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. NAVADMIN 033/94 (CNO Washington DC)
010300 MAR 94

C. Training Materials Required:

1. None

Topic 3.1 InvestigationsDISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

1. Investigations

- a. The Naval Criminal Investigative Service (NCIS) (or other Defense Criminal Investigative Organizations) will normally refer allegations which involve only adult private consensual sexual misconduct, to the military members' commander or commanders for appropriate disposition. Sexual misconduct is defined as a sexual act in violation of Chapter 47 of Title 10 U.S.C. (UCMJ) occurring between consenting adults in private whether on or off a military installation.

- b. If the commander determines that the allegation of sexual misconduct is credible information that forms the basis for discharge, the commander may request investigation by the appropriate criminal investigative organization. However, prior to making such a request the commander must consider that the preferred method of addressing homosexual conduct is by informal fact-finding inquiries and administrative separation.

For example/discussion: Refer to Scenario 12.

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

3. INVESTIGATIONS AND SECURITY

Topic 3.1 Investigations

DISCUSSION POINT

RELATED INSTRUCTOR ACTIVITY

c. The NCIS (or other Defense Criminal Investigative Organization) will retain jurisdiction to investigate sexual acts or acts when aggravating circumstances are involved. (i.e., Involving allegations of force, coercion, or intimidation; abuse of position or rank fraternization; persons under the age of 16; or conduct relating to applicable security standards for access to classified information.)

d. Investigations of both heterosexual and homosexual criminal misconduct must be conducted in an even-handed manner. Investigations will not be conducted solely to determine an individual's sexual orientation.

For example/discussion: Refer to Scenario 13.

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

3. INVESTIGATIONS AND SECURITY

Topic 3.2 Personnel Security

Enabling Objective:

3.2 DESCRIBE the procedures used for matters of personnel security.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. NAVADMIN 033/94 (CNO Washington DC)
010300 MAR 94

C. Training Materials Required:

1. None

3. INVESTIGATIONS AND SECURITY

Topic 3.2 Personnel Security

DISCUSSION POINT

1. Personnel Security

- a. Questions pertaining to an individual's sexual orientation will not be asked on personnel security questionnaires.
- b. No investigations or inquiries will be conducted solely to determine an individual's sexual orientation.

(1) If information about sexual conduct or concealment arises during a personnel security investigation, the investigation will focus on that conduct only if it relates directly to applicable security standards.

(2) Further inquiry should be limited to what is necessary to establish whether the conduct occurred and whether it constitutes a legitimate security concern.

- c. Information about sexual orientation or conduct obtained during security clearance investigations will not be used by the Department of the Navy in separation proceedings.

RELATED INSTRUCTOR ACTIVITY

For example/discussion: Refer to Scenario 14.

LESSON PLAN

DOD POLICY ON HOMOSEXUAL CONDUCT

4. MILITARY TRAINING

Topic 4.1 Requirements

Enabling Objective:

4.1 DESCRIBE the requirements for conducting training on Department of Defense Policy toward Homosexual Conduct.

Trainee Preparation Material:

A. Trainee Support Materials:

1. None

B. Reference Publications: None

Instructor Preparation:

A. Review Assigned Training Material

B. Reference Publication:

1. SECDEF Memo of 21 DEC 94

C. Training Materials Required:

1. None

4. MILITARY TRAININGTopic 4.1 RequirementsDISCUSSION POINTRELATED INSTRUCTOR ACTIVITY

1. Military Training

- a. Personnel will receive training upon initial entry into the naval service and periodically thereafter concerning DOD policy on sexual conduct, including homosexual conduct.

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SCENARIO PACKAGE

**OFFICER ACCESSIONS/GENERAL MILITARY
TRAINING/COMMAND INDOCTRINATION/NAVY RIGHTS AND
RESPONSIBILITIES/POLICY ADMINISTRATORS/COMMANDERS**

The following hypothetical scenario is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 1

SITUATION:

A sailor tells his Commanding Officer (CO) that he is a homosexual. Based on the sailor's statement of his homosexuality, his CO begins immediately to process the serviceman for separation from the service. Three days later, the sailor shows the CO evidence of both written and spoken threats from unidentified persons who are apparently aware of his homosexuality, and who have stated they are going to beat him up.

ISSUES:

What actions should the Service member's CO take?

DISCUSSION:

The CO should ask for investigative assistance from the Naval Criminal Investigative Service (NCIS) with respect to the threat and take all reasonable means to protect the safety of the sailor, as he would any other member of his command. Based upon credible information of a crime, the CO should initiate a criminal investigation into the threats received by the service member.

The sailor's statement that he is a homosexual should not be investigated by the NCIS because a statement that a member is a homosexual does not, by itself, constitute credible evidence of a crime. The CO is appropriately initiating action under the Navy's administrative separation procedures.

The CO may consider transferring the sailor to another location. His final decision on this matter would depend on the nature of the threats and the investigative findings.

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SCENARIO 2

SITUATION:

A junior officer is watching the local TV news coverage of the gay rights parade when he notices a female sailor assigned to his unit marching in the parade in civilian clothes carrying a homemade placard. As the television camera zooms in on the sailor's sign, the officer can clearly read the handwritten words "Lesbians in the military say, 'Lift the Ban!'" The next morning the junior officer reports the incident to his commander.

ISSUES:

Should the commander inquire into what meaning his sailor had intended to convey by carrying that particular sign in the gay rights parade?

DISCUSSION:

A service member carrying a banner or sign in a gay rights activity would not in and of itself constitute credible information indicating proscribed homosexual conduct. In this case, however, the female sailor chose to carry a sign that could reasonably be interpreted as making a statement that she is a homosexual. It would be reasonable for her commander to inquire whether the sailor's actions were intended to inform the public that she was a "lesbian sailor."

A military member's statement that he or she is a homosexual, or words to that effect, is evidence that the military member engages in homosexual acts or has an intent or propensity to do so. Therefore, the commander may inquire into the incident further. Before questioning the sailor about the incident, the commander should advise her of the Navy's policy on homosexual conduct. Should the sailor choose not to discuss the matter further, the discussion should end. The commander would then decide whether to initiate administrative discharge procedures based on the information provided by the junior officer.

The following hypothetical scenario is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 3

SITUATION:

A metropolitan area publication, oriented to the activities and interests of the area's homosexual community, prints a story under the headline, "Gays in Government," purporting to list government workers believed to be homosexuals. The story contains the names of two persons stationed at a nearby military installation. Their commander receives an anonymous letter containing a copy of the article "Gays in Government" and after reading it wonders whether he should conduct an inquiry into the matter or begin administrative separation action on the two individuals for homosexuality. He has never before seen a copy of the publication that printed the article and the story gives no supporting documentation for why any of the individuals listed were believed to be homosexual.

ISSUES:

What action should the commander take in regard to the purported "outing" of the two persons?

DISCUSSION:

The commander should not initiate any inquiry based on this article. The article purports to identify two homosexuals, but does not allege any criminal or otherwise proscribed homosexual conduct. A commander should begin an inquiry only if he has credible information indicating proscribed homosexual conduct. -- i.e., a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

The commander might call the two individuals into his office separately, advise them of the article, and remind them of the DOD policy regarding homosexual conduct. He should advise them that he is conducting no further inquiry into the matter at this time and will consider the matter closed, unless he receives credible information of proscribed homosexual conduct.

The following hypothetical scenario is recommended for investigators and commanders and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 4

SITUATION:

A female officer sees a male officer known to her walk into a well-known homosexual bar. A couple of days later, the female officer sees the male officer walking closely with another man late at night in a park. The female officer tells the male officer that she knows he is a homosexual and that if he does not pay her \$10,000, she will report him to the Naval Criminal Investigative Service (NCIS). The male officer does not say anything, and immediately goes to NCIS to report that the female officer is trying to blackmail him. The NCIS does not ask him if he is a homosexual because, under these circumstances, it would be improper for the NCIS to question him about his sexual orientation. However, the NCIS begins an investigation of the female officer's alleged extortion of the officer.

ISSUES:

Was the NCIS action proper? Should they have investigated the officer for being a homosexual?

DISCUSSION:

The officer provided credible information of alleged extortion by the female officer. There is no credible evidence that the male officer has committed any homosexual act, let alone any criminal act. Therefore, the NCIS approach to the investigation -- investigating alleged criminal activity of the female officer, but not inquiring further into the sexual orientation of the male officer -- is proper.

The following hypothetical scenario is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 5

SITUATION:

During a division officer's "open-door" period, a young sailor comes into the division officer's office and states that he believes he may be homosexual. The division officer advises the sailor about the Navy's policy on homosexual conduct and the sailor replies, "Maybe I shouldn't say anything else." The division officer advises him he might wish to discuss the matter with the chaplain.

ISSUES:

The division officer wonders whether he should recommend separation action on the basis of the sailor's statement that he believes he may be homosexual. Should he recommend the Naval Criminal Investigative Service (NCIS) investigate to determine if the sailor has committed any homosexual acts since entering the Navy? Should he recommend a commander's inquiry to determine if grounds for administrative separation exist?

DISCUSSION:

A Service member's commander may initiate an inquiry based on a member's statement only if the commander determined that there was credible information that a basis for discharge exists. If the commander believed that the statement merely indicated a young person's confusion over some aspect of his sexual identity and did not constitute a statement by the member that he is a homosexual, the commander would not recommend an inquiry. If the commander believed, in light of his knowledge of the member and the circumstances of the statement, that the member was stating that he is a homosexual, he would initiate an inquiry.

In this case, since the sailor has not indicated that he has committed any criminal act, this case should not be referred to NCIS. Had the sailor stated he had engaged in a homosexual act or acts in violation of the UCMJ, the division officer would also advise the sailor of his rights under Article 31b of the UCMJ.

The following hypothetical scenario is recommended for personnel involved in the accession process and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 6

SITUATION:

An applicant comes into a recruiting station and says that he would like to enlist. Although, in accordance with Navy policy, the recruiter does not ask any questions about the applicant's sexual orientation or sexual conduct, the applicant states, of his own accord: "I'm a homosexual."

ISSUES:

What should the recruiter do after hearing the applicant's statement?

DISCUSSION:

Applicants will not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual during the accession process. In addition, applicants will not be asked whether they have engaged in homosexual conduct unless independent evidence is received indicating that an applicant has engaged in such conduct or unless the applicant volunteers a statement that he is a homosexual or a bisexual, or words to that effect.

In this case, if an applicant nevertheless comes into a recruiting office and volunteers a statement that he is a homosexual, that applicant will be rejected, unless he can demonstrate that he does not engage in homosexual acts and does not have an intent or propensity to do so. In this scenario, once the applicant said "I am a homosexual," the recruiter could tell him that the service assumes that the applicant's statement means that he engages in homosexual acts or has a propensity or intent to do so. The recruiter could then ask the applicant if this is what he meant. If the applicant answers "Yes," the applicant could be rejected.

The following hypothetical scenario is recommended for investigators and commanders and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 7

SITUATION:

A Naval Criminal Investigative Service (NCIS) office has received several complaints from both Navy and civilian personnel concerning homosexual acts occurring in a restroom at one of the gymnasiums on a Naval Base. Several different witnesses have provided names of military personnel and civilians who have been seen numerous times in the restroom performing primarily oral sodomy, but in several incidents anal intercourse. In addition to naming individuals, sailors working out at the gym have provided specific times during the day that appear to be the "busy times" for homosexual activity. The agent in charge of the NCIS office decides to send a cover NCIS agent into the restroom to investigate and develop further evidence concerning the allegations.

ISSUES:

Can the NCIS investigate alleged acts of sodomy using undercover techniques?

DISCUSSION:

Yes. The eyewitness accounts of frequent incidents of criminal activity on the military installation warrants an investigation. Once they have credible evidence to establish that criminal acts are being committed, NCIS may utilize any reasonable investigative technique to prove the elements of the crime.

In this case, the NCIS has knowledge of repeated and frequent acts of sodomy occurring at specific times at one of the installation gymnasiums. Use of an undercover agent would be appropriate in this instance. Care must be taken in authorizing the use of surveillance techniques, such as hidden audio and video surveillance, but in the circumstances recited here, such techniques would be permitted.

The following hypothetical scenario is recommended for personnel that deal with administrative separations. This scenario illustrates the operation of the "rebuttable presumption" that arises when a Service member states that he or she is homosexual. The scenario is an example of administrative discharge proceedings in which a Service member attempts to rebut the presumption; it does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 8

SITUATION:

An officer tells his best friend, another officer, that he has recently come to terms with his sexuality and has decided that he is homosexual. He says, however, that he has not engaged in any homosexual acts during his 6 years of military service, and that he will continue to refrain from such acts. Although the officer asks his friend not to tell anyone else about their conversation, the friend tells the Commanding Officer (CO). Having determined that the friend's account of the officer's statement constitutes credible information of homosexual conduct, the CO then asks the officer whether he told his friend that he is homosexual. The officer answers, "Yes."

At a Board of Inquiry hearing, the Navy presents the testimony of the officer's friend and the CO about the officer's statements to the Board. There is no evidence that the officer engaged in any homosexual acts.

The officer presents testimony from several fellow officers and subordinate enlisted, all males. Those individuals testify that the officer has never stated or suggested to them that he is a homosexual and has never made any sexual advances or engaged in sexual innuendo toward them or anyone they know. They also state that the officer is an outstanding leader, that he is always truthful and conscientious, and that they believe he is fully capable of abiding by all Navy regulations, including restrictions on homosexual conduct. Finally, the officer himself testifies that, although he considers himself homosexual, he has not engaged in any homosexual acts during his 6 years of service, and that he intends to continue to refrain from such acts during the remainder of his time in the Navy.

ISSUES:

How should the Board of Inquiry consider whether the officer has successfully rebutted the presumption?

SCENARIO 8 (Continued)

DISCUSSION:

The officer's statement to his friend that he is homosexual created a rebuttable presumption that the officer engages in or has the propensity or intent to engage in homosexual acts. The question for the Board of Inquiry is whether the officer's evidence succeeded in rebutting that presumption by demonstrating that the officer in fact does not engage in homosexual acts and is unlikely to do so. In making that determination, the Board could consider, among other things:

- A. The evidence that the officer had not engaged in any homosexual acts.
- B. The officer's credibility.
- C. The testimony from other service members about the officer's past conduct, character, and credibility.
- D. The nature and circumstances of the officer's statements to his friend and the CO.

The Board is also free to ask the officer questions about past conduct.

The following hypothetical scenario is recommended for personnel that deal with administrative separations. This scenario illustrates the operation of the "rebuttable presumption" that arises when a Service member states that he or she is homosexual. The scenario is an example of administrative discharge proceedings in which a Service member attempts to rebut the presumption; it does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 9

SITUATION:

A sailor states to his Commanding Officer that he is a homosexual. He also tells this to several other sailors. An Administrative Discharge Board is convened. At the Board hearing, the sailor does not dispute that he stated on several occasions that he is a homosexual. He promises, however, that will not engage in any homosexual acts during the remainder of his term of enlistment. The sailor presents no other evidence. When asked by the Board whether he engages in or has engaged in homosexual acts, the sailor refuses to answer.

ISSUES:

How should the Administrative Discharge Board consider whether the sailor has successfully rebutted the presumption?

DISCUSSION:

A statement by a Service member that he or she is a homosexual creates a rebuttable presumption that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This means that the statement itself is evidence that the member engages in or is likely to engage in homosexual acts. If the member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not likely to do so, he or she may be discharged.

In determining whether a Service member has successfully rebutted the presumption, an Administrative Discharge Board may consider, among other things: whether the member has engaged in homosexual acts; the member's credibility; testimony from others about the member's past conduct, character, and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member is likely to engage in homosexual acts. The Board also may inquire whether the member engages in or has engaged in homosexual acts.

SCENARIO 9 (Continued)

In this case, the only evidence that the sailor presented was his promise that he would not engage in any homosexual acts during the remainder of his term of enlistment. The issue for the Administrative Discharge Board is whether that promise, in light of the Board's assessment of the sailor's credibility and the nature and circumstances of his statements that he was a homosexual, was sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so. In making its determination, the Board may consider that the sailor did not present any evidence showing that he does not engage in, and has not engaged in, homosexual acts, and that he refused to answer when asked by the Board about homosexual acts.

The following hypothetical scenario is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 10

SITUATION:

A sailor has been observed entering, leaving, and generally "hanging around" a downtown gay bar. The commander is notified of the observations but isn't sure what action, if any, he should take.

ISSUES:

What should the commander do? Can the commander administratively discharge the sailor for going to a gay bar? Should he conduct a commander's inquiry?

DISCUSSION:

Given the absence of any information, credible or otherwise, of the occurrence of either a crime or otherwise proscribed conduct, the commander should not begin an inquiry into this matter. Going to a gay bar is not a crime, nor does it, in itself, constitute a "nonverbal statement" by the Service member that she is a homosexual. A commander may begin an inquiry, however, if a member engages in behavior that a reasonable person would believe is intended to convey the statement that the member is a homosexual or bisexual.

The commander in this case may wish to point out to his subordinate that her favorite club is known to be an establishment catering to homosexuals.

The following hypothetical scenario is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 11

SITUATION:

An officer observes two male junior enlisted service members walking and holding hands while off-duty and on liberty. The sailors are wearing civilian clothes and are in an isolated wooded public park and, except for the officer, they are alone. He reports the incident to his Commanding Officer (CO) and adds that he is surprised to find out they appear to be homosexuals. He asks the CO what he proposes to do about the incident. The CO decides that he will call the two sailors into his office, separately, and ask them about the officer's observations.

ISSUES:

Was the CO's action appropriate? If not, what action should he have taken?

DISCUSSION:

The officer's statements regarding his observation of the two sailors walking and holding hands in the park constitutes credible information of homosexual conduct if the officer is someone the CO otherwise trusts and believes. The two sailors hand-holding in these circumstances indicates homosexual conduct and therefore the CO may follow-up and inquire further. Probably, the extent of the inquiry will be two confidential one-on-one conferences between the CO and the two sailors to inquire into the incident.

Before the sailors are asked to discuss or explain the incident, the CO should advise them of the Navy's policy on homosexual conduct. Should they decline to discuss the matter, the questioning should stop. At that point, the CO may consider other relevant information and decide whether to initiate administrative separation actions based on the information he possesses.

The following hypothetical scenario is recommended for investigators and commanders and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 12

SITUATION:

A petty officer walks into his barracks room and observes two other sailors engaging in an act of sodomy. He notifies his Chief Petty Officer (CPO) and the Master-At-Arms (MAA). The MAA responds to the barracks where the two suspects are placed under apprehension and advised of their rights. During the course of the apprehension, the MAA finds, in plain view, photographs of one of the suspects engaging in anal sodomy with other sailors, some of whom are known to the CPO. They also find a personal letter from the same suspect, addressed to another man and signed "All my love, Sugar." These items are taken as evidence. The sailor's commander calls the Naval Criminal Investigative Service (NCIS) and advises that the two sailors have admitted, under rights advisement, to committing an act of sodomy.

The commander wants the NCIS to continue the investigation by scouring every photograph and the letter to attempt to compile a list of other possible homosexual service members. Once the list is compiled, the commander wants the NCIS to question both suspects in detail concerning whether they know if anyone on the list is homosexual or has committed homosexual acts. The commander says he wants to hunt out any and all homosexuals within his unit.

ISSUES:

Should the NCIS continue the investigation after the suspects have admitted to the offense of sodomy? If yes, how should the investigation proceed? Should the NCIS comply with the commander's direction to ferret out any homosexuals in the unit?

SCENARIO 12 (Continued)

DISCUSSION:

The NCIS would not normally initiate an investigation of consensual adult private sexual conduct. However, in this case the act of sodomy occurred not in private but in a shared barracks room, and therefore may be investigated. Even so, under the new policy, the NCIS should continue its investigation into alleged homosexual conduct only so long as necessary to develop the relevant facts and circumstances surrounding the offense. In cases of consensual sodomy in which the military members involved in the sexual act admit to the crime, the case will usually be closed and further investigation halted. The military members would not be asked about other partners with whom they may have had sex, absent evidence of other criminal activity.

In this case, in the routine course of investigating the act of sodomy, the NCIS has discovered credible evidence of additional alleged criminal acts -- the photographs. The NCIS should investigate the facts surrounding the acts depicted in the photos. This would include questioning the suspect depicted in the photos concerning his sexual partners shown in the photographs engaging in criminal activity. Other Service members in the pictures who are identified by the suspect may be questioned regarding the activities at issue.

As to the letter, the fact that it is written to another man and signed, "All my love, Sugar" may indicate another homosexual relationship involving one of the two sailors found committing sodomy. Furthermore, if the NCIS were to follow the commander's instructions and proceed to "hunt" for any and all homosexuals, they would probably scrutinize the letter closely to compile a list of other names referenced therein. This way they could question each and every possible homosexual and, in turn, compile additional lists of other homosexuals. Such an approach to investigating possible incidents of homosexuality is expressly prohibited. At any given point in a criminal investigation involving homosexuality, the investigating agents must be able clearly and specifically to explain which criminal acts they are investigating and how the investigation relates to those criminal acts. No criminal investigations should be made into whether a person is homosexual, but only to investigate criminally proscribed acts. In this case, unless the letter has evidentiary value relating to one of the suspects, the NCIS should give the letter to the commander and not use it to launch investigations of any other persons. The commander may evaluate it for credible information and possible grounds for administrative discharge.

The following hypothetical scenario is recommended for investigators and commanders and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 13

SITUATION:

The commander of a Navy Base calls up his Naval Criminal Investigative Service (NCIS) commander and requests that he stop by to discuss a "problem." In the nearby civilian community, a new social club has recently opened and is known to be frequented almost exclusively by homosexuals. Thursday nights are advertised as "Navy Night," with all sailors being offered free admission and reduced price on alcoholic beverages. The commander wants his NCIS agents to coordinate with the local police to conduct surveillance of the gay bar on "Navy Night" and compile a list of all sailors entering the club. He proposes that NCIS agents trace license numbers of all vehicles parking in the club's parking lot that display Base identification stickers.

ISSUES:

Is this type of "stake-out" permitted under the new policy?

DISCUSSION:

No. The base commander does not have credible evidence that a specific crime has been committed. Even if the commander had received reports that numerous sailors had been observed entering and exiting the purported gay bar, absent evidence of a crime, there would be no basis to conduct a surveillance operation as requested by the installation commander.

The base commander is reminded that NCIS agents currently receive copies of all arrest documents relating to lewd and lascivious behavior or other criminal conduct occurring in the local community, which is punishable under the UCMJ.

NOTE:

This exemplifies a key change to the Navy policy on investigations. Even though the military authorities have information of an off-post gay bar frequented by military members, they may not conduct a criminal investigation absent a specific allegation of a criminal act. Frequenting a gay bar is not a criminal act.

There is no legal impediment to either local civilian or military law enforcement activities investigating alleged criminal activity at public locations. In this case, however, where no specific criminal activity is alleged, surveillance would have had the singular purpose of actively seeking out possible homosexuals. This is contrary to the Navy policy on Investigations of Sexual Misconduct, which specifically precludes any investigation solely to establish an individual's sexual orientation. In addition, a fact-finding inquiry by the commander for purposes of administrative separation would not be appropriate, as going to a gay bar does not constitute credible information of proscribed homosexual conduct.

The following hypothetical scenario is recommended for investigators and commanders and is for training purposes only. The scenario is not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the Department of Defense policy on homosexual conduct in the Armed Forces. The scenario does not establish any evidentiary standards or create any substantive or procedural rights.

SCENARIO 14

SITUATION:

While investigating a fraud case involving "E-Mail" transmissions between two officers, the Naval Criminal Investigative Service (NCIS) obtains the commander's authorization to search one of the suspect's computer files stored on his personal computer at home. During the search of the computer, the NCIS agent notices that the suspect subscribes to a computer information service apparently catering to a homosexual and bisexual clientele. The agent scrolls through the directory and notes that the computer service has a directory entitled "Gay Military Service Members" and lists the names, ranks, and addresses of approximately 400 persons. The agent contacts his supervisor and asks whether, based on this list which purports to identify approximately 400 homosexuals in the military, the NCIS should investigate any or all of the names listed for sodomy or other crimes involving homosexual acts.

ISSUES:

Should the NCIS investigate anybody on the list for crimes involving homosexual acts? What should the NCIS do with the list?

DISCUSSION:

The NCIS should not initiate an investigation of any of the names listed on the computer file. There is no alleged crime to investigate. Names on the list are not credible evidence of any crimes. Not only do the files disclose nothing more than the names of purported homosexuals, as opposed to evidence of alleged homosexual acts, but the information is not "credible information" because nothing is known about how the information came to be stored in the computer file or the reliability of the information. The information is also not a basis for administrative separation and should not be referred to the individual's commander. The NCIS should leave the file alone and not take further action.

TRANSPARENCY PACKAGE

**OFFICER ACCESSIONS/GENERAL MILITARY
TRAINING/COMMAND INDOCTRINATION/NAVY RIGHTS AND
RESPONSIBILITIES/POLICY ADMINISTRATORS/COMMANDERS**

DOD POLICY

It is the DOD Policy to judge the suitability of persons to serve in the Armed Services on the basis of their conduct and their ability to meet required standards of duty performance and discipline. A person's sexual orientation is considered a personal and private matter, and is not a bar to military service unless manifested by homosexual conduct. Homosexual conduct is grounds for separation from the Military Services.

UCMJ ARTICLE 117 PROVOKING SPEECH OR GESTURES

Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

UCMJ ARTICLE 125 SODOMY

- (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.**
- (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.**

UCMJ ARTICLE 128 ASSAULT

- (a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.**
 - (b) Any person subject to this chapter who-**
 - (1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or**
 - (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;**
- is guilty of aggravated assault and shall be punished as a court-martial may direct.**

UCMJ ARTICLE 134 GENERAL ARTICLE

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

SEXUAL ORIENTATION VERSUS HOMOSEXUAL CONDUCT

SEXUAL ORIENTATION:

An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

HOMOSEXUAL CONDUCT:

- A homosexual act
- A statement by the Service Member that demonstrates a propensity or intent to engage in homosexual acts
- Homosexual marriage or attempted homosexual marriage

UCMJ ARTICLE 31 COMPULSORY SELF-INCRIMINATION PROHIBITED

- (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may incriminate him.**
- (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.**
- (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.**
- (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in trial by court-martial.**